SUPREME COURT. U. S.

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JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 295

NEW ORLEANS CITY PARK IMPROVEMENT ASSOCIATION,

Appellant,

versus

MANDEVILLE DETIEGE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, ET AL.,

Appellees.

Appeal from the United States Court of Appeals for the Fifth Circuit.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. _____

NEW ORLEANS CITY PARK IMPROVEMENT ASSOCIATION,

Appellant,

versus

MANDEVILLE DETIEGE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, ET AL.,

Appellees.

Appeal from the United States Court of Appeals for the Fifth Circuit.

JURISDICTIONAL STATEMENT ON BEHALF OF APPELLANT.

STATEMENT AS TO JURISDICTION.

In compliance with Rules 13 and 15 of this Court, New Orleans City Park Improvement Association, *et al.*,

appellants, submit herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the United States Court of Appeals for the Fifth Circuit entered on February 13, 1958, rehearing denied March 28, 1958.

OPINION BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported but is attached hereto as Appendix "A". The United States District Court for the Eastern District of Louisiana, New Orleans Division, rendered no formal or written opinion nor did it render findings of fact and conclusions of law.

BASIS OF JURISDICTION.

I.

Complainants, Mandeville Detiege, an individual negro, and the Crescent City Golf Club, an unincorporated association composed of negroes, brought this action against the New Orleans City Park Improvement Association, a public body corporate of the State of Louisiana, seeking first a declaratory judgment and secondly a permanent injunction on behalf of themselves and all others similarly situated against the Defendants from denying the Plaintiffs and other negroes similarly situated the use of the New Orleans City Park and its facilities, on account of their race or color, as well as the right of ingress, stopping in, parking or in anywise having access to the golf links, tennis courts, stadium, picnic grounds, boating and other recreational facilities upon the same terms and conditions as Defendants provide and operate

said New Orleans City Park facilities for white citizens similarly situated.

II.

The final judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 13, 1958, and an order denying a rehearing was entered on March 28, 1958. There was filed in the United States Court of Appeals for the Fifth Circuit a notice of appeal on June 23, 1958.

III.

The jurisdiction of this Court to review on appeal the final judgment of the United States Court of Appeals for the Fifth Circuit is conferred by 28 U. S. C. A. § 1254(2), 62 Stat. 928.

IV.

Cases which sustain the jurisdiction of this Court to review on appeal the final judgment of the United States Court of Appeals for the Fifth Circuit holding a Louisiana statute invalid as repugnant to the Federal Constitution are:

> *Watson v. Employers Liability Assurance Corporation*, 75 S. Ct. 166, 348 U. S. 69, 99 L. Ed. 635, rehearing denied 75 S. Ct. 289, 348 U. S. 921, 99 L. Ed. 722.

V.

The following statutes of the State of Louisiana were held to be invalid:

1. Constitution, State of Louisiana, Article XIX, Sec. 26, as amended by Art. 613 of 1956,

adopted by the people of Louisiana November 6, 1956. (See Appendix "B" for text).

2. Louisiana Revised Statutes of 1950, R. S. 33:4558.1 as amended by Secs. 1-3 by Act 14(g) 1956. (See appendix for text).

VI.

THE FOLLOWING QUESTION IS PRESENTED BY THIS APPEAL.

In granting a summary judgment permanently enjoining the Defendant, New Orleans City Park Improvement Association, a municipal corporation and agency of the State of Louisiana, from denying plaintiffs and other negroes, solely on account of their race or color, the use of the facilities of the New Orleans City Park, did the District Court and the United States Court of Appeals for the Fifth Circuit commit error:

(A) In failing to sustain Defendant's motion to dismiss based on lack of jurisdiction over the subject matter because of the provision of Sec. 26, Article XIX of the Louisiana Constitution of 1921 as amended,

(B) In holding Louisiana Revised Statutes of 1950, 33:4558.1 unconstitutional,

(C) In not permitting Appellants the opportunity to introduce evidence to determine whether psychological consideration of the case of *Brown, et al., v. Board of Education of Topeka*, 347 U. S. 483 are factually valid and/or applicable to public parks.

VII.

STATEMENT OF THE CASE.

Complainants, Mandeville Detiege, an individual negro, and the Crescent City Golf Club, an unincorporated association composed of negroes, brought this action in November of 1949 against the New Orleans City Park Improvement Association, a public body corporate of the State of Louisiana, seeking first a declaratory judgment and secondly a permanent injunction on behalf of themselves and all others similarly situated against the Defendants from denying the Plaintiffs and other negroes similarly situated the use of the New Orleans City Park and its facilities, on account of their race or color, as well as the right of ingress, stopping in, parking or in anywise having access to the golf links, tennis courts, stadium, picnic grounds, boating and other recreational facilities upon the same terms and conditions as Defendants provide and operate said New Orleans City Park facilities for white citizens similarly situated.

Defendants in June of 1951 pleaded to the jurisdiction of the Court and also for a motion for a more definite statement and after hearing, both of these motions were overruled by the District Judge whereupon Defendants filed their answer in August of 1951. Defendants accompanied their answers with certain written interrogatories to the Complainants which, in due course, were answered.

In Defendant's answer in the first defense, among other contentions, it was averred that the Complainants had not exhausted their administrative remedies and admitted that it was the Defendant's policy not to permit the

mingling of white and colored persons on the golf links of the Park as it had been the policy of the Board to enforce segregation as generally practiced in the State of Louisiana and further that the City of New Orleans was at that time taking steps to provide equal facilities for negroes for the bringing about substantially equal recreational facilities for both white and negro persons.

The second defense was the specific averment based upon the lack of exhaustion of the administrative remedies within the procedure provided by the Board.

The third defense set up in the answer filed August 18, 1951 was that the policy enforced by the Defendant Board was adopted in the exercise of the police power of the State of Louisiana and that it was a reasonable exercise of such power, taking into account the established usages, customs and traditions of the people of said State of Louisiana, the promotion of their comfort, and the preservation of public peace and good order; and that the said policy was in keeping with the general policy of segregation of the white and negro races in Louisiana and as an illustration of this policy Defendants included in their answer a specification of examples thereof existing under the laws and Constitution of the State of Louisiana.

As a fourth defense it was urged that an opportunity be given to Defendants to furnish substantial equal facilities to Plaintiffs.

As a fifth defense it was urged that the District Court should not as a Court of equity render a declaratory judgment or injunction against an agency of the State of Louisiana.

On October 2, 1951 Complainants moved the Court "to enter a judgment on the pleadings". On October 31, 1951 a hearing was had on this motion and the Court denied the motion "with right given to plaintiff to reurge motion after decision of Supreme Court in South Carolina Case".

On December 21, 1951 Complainant reurged his motion for judgment on the pleadings specifically citing the case of *Beal, et al., v. Holcombe, Mayor of the City of Houston, et al.*, and on January 16, 1952 a hearing was had upon that motion whereupon the Court entered the following decree, "It is ordered that the above numbered and entitled case be continued to permit plaintiff to exhaust his administrative remedies".

On December 11, 1956 Complainant again moved the Court "to enter judgment on the pleadings".

During the pendency of this matter Defendant's original counsel, Warren O. Coleman, died.

Present counsel asked that a hearing on Complainant's motion filed December 11, 1956 be continued for such a period of time as to permit various supplemental and amended pleadings. This was granted by the Court and Defendants, in February of 1957, moved that the complaint be dismissed as to Marcel Montreuil who had been the Manager of the New Orleans City Park for the reason that he had died and that a successor to him had been duly appointed in March of 1950 and that Complainant never made a substitution of parties.

On February 6, 1957 Defendants further filed a motion to dismiss based on lack of jurisdiction over the subject matter because of the provisions of Section 26, Article XIX of the Louisiana Constitution of 1921 which said Section was ratified by the people of the State of Louisiana at an election in November of 1956.

On February 6, 1957 Defendants further amended their pleadings pleading the provisions of Act 14 of 1956 of the State of Louisiana (Louisiana Revised Statutes 33:4558.1) specifically providing for segregation in Parks and moved the Court to dismiss the complaint under the provisions of Federal Rules of Civil Procedure 12(b) 6 "for failure to state a claim upon which relief can be granted" because the complaint failed to attack the State Acts by which Defendants are bound. And the Court was further moved that the Attorney General of the State of Louisiana was a necessary party to the suit under the provisions of Louisiana Revised Statute 13:4241 and that Complainant be permitted to join the Attorney General of the State of Louisiana as a necessary party Defendant.

On February 6, 1957 Defendants further amended the original answer which had been filed on August 13, 1951 by adding thereto the provisions of Act 14 of 1956 (Louisiana Revised Statutes 33:4558.1) and specifically averred that the enactment of such legislature was justified in view of all of the evidence previously filed in the matter of *Bush, et al., v. Orleans Parish School Board*, Civil Action 3630 of the docket of the United States District Court, Eastern District of Louisiana "which said physiological, psychological and sociological affidavits and

exhibits are made part hereof by reference as though filed herein and are offered in support of this defense as well as the annual report of the Police Department, New Orleans, La., for the years 1953, 1954, 1955 and 1956".

After the filing of the above pleadings by Defendant, Complainant on February 18, 1957 moved to substitute Ellis P. Laborde as the new General Manager of the City Park in place of Marcel D. Montreuil who had died in March 1950.

On March 20, 1957, a hearing was had on all of the then pending motions, at which time the Court took all of them under advisement and issued an order to "allow the Attorney General of the State of Louisiana thirty (30) days wherein which to appear and file brief, and he shall be so notified."

On April 17, 1957 inasmuch as the Attorney General had not been notified the Court extended the time for notification until May 5, 1957 and on May 3, 1957 the Attorney General of the State of Louisiana moved the Court (1st) to dismiss this action on the grounds that it lacked jurisdiction (2nd that there had been insufficient process and service (3rd) that the action failed to state a claim and (4th) that the Complainant had failed to join an indispensable party as a party defendant, *i. e.*, the State of Louisiana.

On May 15, 1957 a hearing was had on the motion of the Attorney General wherein all of the motions of the Attorney General were denied and the Court further issued an order to the effect, "It is the judgment of the Court

that all State statutes and municipal ordinances which would deny facilities of City Park to negroes solely because of their race are unconstitutional and therefore invalid. Judgment will be granted as prayed for and a permanent injunction will issue".

On May 27, 1957 an order consistent with the Court's finding was issued. The judgment contained the provision that it should "become effective upon its becoming final after exhaustion of appeals" and on May 31, 1957 Defendants gave notice of appeal at which time the entire record was designated to the Clerk of Court which said designation was confirmed in writing by letter dated July 10, 1957.

On January 16, 1958, the case was orally argued before the United States Court of Appeal for the Fifth Circuit and that Court rendered a *per curiam* opinion on February 13, 1958 affirming the District Court. A rehearing was denied on March 28, 1958 and a notice of appeal was filed on June 23, 1958.

THE QUESTION PRESENTED IS SUBSTANTIAL.

A Summary Judgment Is Never Warranted Where Issue As To Any Material Fact Remains For Trial.

The District Court erred in granting Complainant's motion "to enter judgment on the pleadings" which must be treated as a motion for summary judgment under Federal Rules of Civil Procedure 56.

A summary judgment is never warranted unless it is clear that no genuine issue as to any material fact remains for trial.

Chappel v. Gottsman, 186 Fed. (2d) 215;

Williamson v. T. S. C. Motor Freight, 203 Fed. (2d) 257;

Slagle v. U. S., 228 Fed. (2d) 673 wherein the court held:

"The clearing of Court dockets is one of the desiderata in the judicial function. But it should not be allowed to become a fetish for it does not rank with the raison d'etre of Courts."

WHAT GENUINE ISSUE OF MATERIAL FACT REMAINS FOR TRIAL IN THE INSTANT CASE?

The entire rationale of the doctrine of the Supreme Court of the United States as set forth in *Brown, et al., v. Board of Education of Topeka*, 74 S. Ct. 686, 347 U. S. 483, 98 L. Ed. 873 is based upon the "modern authorities" set forth in footnote 11 of that case. We quote from Chief Justice Warren's opinion:

"Whatever may have been the extent of psychological knowledge at the time of Plessy v. Ferguson, this finding is amply supported by modern authority. [11]Any language in Plessy v. Ferguson contrary to this finding is rejected."

Footnote 11 reads as follows:

"K. B. Clark, Effect of Prejudice and Discrimination on Personality Development (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, Personality in the Making (1952), C. VI; Deutscher and Chein. The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion, 26 J. Psychol.

259 (1948); Chein, What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, Educational Costs, in Discrimination and National Welfare (MacIver, etc., (1949), 44-48; Frazier, The Negro in the United States (1949), 674-681. And see generally Myrdal, An American Dilemma (1944)."

It can easily be seen that these are not legal authorities but textbook and journal article authorities and in order to test their validity in a Court of law similar evidence could be introduced and the Court would then weigh the authorities cited by Chief Justice Warren with the authorities offered in opposition to the correctness of those authorities.

In the District Court below Defendants made, on February 6, 1957, a part of the record, in support of their amendment to the answer previously filed, all of the evidence adduced and filed in the matter of *Bush v. Orleans Parish School Board* and those physiological, psychological and sociological affidavits and exhibits were made part of the record, and have been brought up on appeal.

We ask the examination of these authorities against the modern authorities which are the sole authority for the doctrine of the *Brown v. Board of Education of Topeka* case, for if modern authorities are found lacking then the decision is inherently erroneous and lacks not only judicial authority but logical basis to set aside the lawful and logical interpretations of the United States Constitution, as amended, and as defined by prior U. S. Supreme

Court pronouncement commencing with the case of *Plessy v. Ferguson* rendered May 18, 1896, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 250 and which continued without interruption up to the *Topeka* case in 1954—58 years.

In order for a Court to make this comparison defendants would bring the affiants, eminent physicians, professors, etc., into Court and let them testify and permit them to express their opinions as they have in their various affidavits. Complainants would have ample opportunity to confront them with the modern authority cited in *Brown* and cross-examine them where their views disagree therewith.

When a decision has been made which is not based upon prior law but upon textbooks and other writings of a non-judicial nature, certainly if justice is to prevail and if law is to prevail those authorities are subject to examination in Court and the only way this can be done is by weighing them against other authorities.

Obviously it cannot become a battle of library books just as a personal injury claim cannot be established with certainty by having the layman testify as to his symptoms and complaints and then introducing medical textbooks and then asking the Court to draw medical conclusions.

There is then a genuine issue as to material facts which remains to be tried in this case.

One might say that counsel is trying to try the school segregation cases and that the instant case involves

park segregation and in fact the lower court made such a statement and precluded further argument by counsel at this point. Counsel earnestly urges to this Court that the sole basis for the cases of *Alfred Holmes v. City of Atlanta, et al.*, U. S. Sup. Ct., 350 U. S. 879, 76 S. Ct. 141, 100 L. Ed. ....., and *Mayor and City Council of Baltimore City of Dawson*, 350 U. S. ....., 76 S. Ct. 133, 100 L. Ed. ....., is the rationale of the *Brown v. Topeka* case and if its major premise is wrong, *i. e.*, the conclusion of the modern authorities, then it is a wrong decision and necessarily the *Atlanta* and *Baltimore Park* cases based thereon are also erroneous.

It is appropriate at this point to compare the logic and judicial pronouncements of Justice Brown in *Plessy v. Ferguson* of 1896 with those of Chief Justice Warren of 1954. Justice Brown had the following to say:

> "We consider the underlying folly of plaintiffs argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the State Legislature, and should enact a law in precisely similar terms, it would thereby religate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legisla-

tion, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. **If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each others merits and a voluntary consent of individuals.** As was said by the Court of Appeals of New York in People v. Gallagher, 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designated to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.' **Legislation is powerless to eradicate racial instincts to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the Civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."**

A mere reading of the public press and attention to the news and television commentators and published reports of the activities of our public officials and citizens all the way from the President of the United States to numerous cases of individuals' actions since the pronounce-

ment of Justice Warren in 1954 bears out the wisdom of Justice Brown as set forth above and particularly "the argument also assumes that social prejudices may be overcome by legislation and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality it must be the result of natural affinities, a mutual appreciation of each others merits and a voluntary consent of individuals."

Does not this own Court's experience in the multiplicity of integration cases since *Brown v. Topeka* bear out Justice Brown's wisdom?

Counsel does take the liberty at this point of quoting a few excerpts from the books themselves which in truth and in fact show that they are not authorities at all. They are qualified by their own writings as such. See "*Personality In The Making*", by Witmer and Kotinsky, at Page 139:

> "There has not been much scientific research on the effects of prejudice and discrimination on personality information. What research there is, however, appears to support the gloomy observations made above."

And at Pages 139 and 140:

> "Unfortunately for scientific accuracy and adequacy, thoroughly satisfactory methods of determining the effects of prejudice and discrimination on health of personality have not yet been devised, nor has a sufficient number of studies dealing with the various minority groups been made."

One of the books, "*An American Dilemma*", by Myrdal, is written by a foreigner (See Foreword and Author's Preface thereto, Pages v thru xx) and not even a United States citizen and a stranger to our communities where there are a large white and colored population.

Is Your Honors' experience that of the words of Witmer and Kotinsky, at Page 147 of "*Personality In The Making*":

> "Some of the social scientists whose opinions were cited above stated that prejudice and discrimination are even more detrimental to the emotional well-being of the prejudiced person than to those who are the objects of discrimination. Others thought that this might possibly be the case. The comments of these social scientists may be summarized as follows:
>
> "1. Segregation is a symptom of some maladaptive psychological process.
>
> "2. It has pervasive and elusive harmful effects; e. g., increased hostility, deterioration of moral values, the coarsening of interpersonal sensitivity, conflict between ideology and practices, rationalizing, etc.
>
> "3. Inner conflicts and guilt feelings may result from membership in groups enforcing segregation.
>
> "4. There may be disturbances in the individual's sense of reality and the relation of the individual to the work around him."

It is to be borne in mind that the reversal of fifty-eight years of prior jurisprudence in the case of *Brown*

v. Board of Education of Topeka was based on these pronouncements.

Appellants do not ask this Court to reverse the *Brown* case—they simply state that in order for them to properly build up a record for testing the validity of the authorities relied upon by the Supreme Court in the *Brown* case, they must be permitted to introduce contradictory evidence in the form of expert testimony. Their ability to do so was demonstrated by the affidavits which were made exhibits. If this trial in the lower Court is not permitted, it will never be possible for a litigant to raise the soundness of the textbook authorities relied on by the Supreme Court in *Brown v. Board of Education of Topeka.*

CONCLUSION.

It is submitted that the motion for summary judgment which was granted in the lower Court should be reversed and that this matter should be remanded for further proceedings in the case, in the District Court.

Respectfully submitted,

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ED J. de VERGES,
Whitney Building,
New Orleans, La.,
Attorneys for New Orleans City Park Improvement Association and Ellis P. Laborde, The Manager Thereof, Appellant.

AFFIDAVIT OF SERVICE PURSUANT TO RULE 33 OF THE RULES OF SUPREME COURT OF THE UNITED STATES.

STATE OF LOUISIANA :
PARISH OF ORLEANS :

Before me, the undersigned authority, personally came and appeared Louis B. Porterie, Attorney for the New Orleans City Park Improvement Association and Ellis P. Laborde, the Manager thereof, Appellants, who did depose and state that he has served a copy of the foregoing Jurisdictional Statement to the Supreme Court of the United States by depositing the same in the United States Post Office or mail box with first-class postage prepaid, addressed to:

1. The Appellees through their Attorney of Record, A. P. Tureaud, 1821 Orleans Avenue, New Orleans, Louisiana, this ..... day of August, 1958.

LOUIS B. PORTERIE,
1206 American Bank Bldg.,
New Orleans, Louisiana.

SWORN TO AND SUBSCRIBED

before me this ..... day of

....., 1958,

New Orleans, La.

Notary Public

APPENDIX "A".

OPINION OF THE COURT FILED
February 13, 1958

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16,864

NEW ORLEANS CITY PARK IMPROVEMENT ASSOCIATION,

Appellant,

versus

MANDEVILLE DETIEGE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, ET AL.,

Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(February 13, 1958).

Before HUTCHESON, Chief Judge, and TUTTLE and JONES, Circuit Judges.

PER CURIAM: This appeal from a summary judgment declaring the rights of the parties, and permanently enjoining the defendant, New Orleans City Park Improvement Association, a municipal corporation, from denying plaintiffs and other Negroes, solely on account of their race or color, the use of the facilities of the New Orleans City Park, calls for affirmance on the authority of Holmes v. City of Atlanta, 350 U. S. 879, and Mayor and Council of Baltimore City v. Dawson, 350 U. S. 877. Arising from a complaint in which the Negro plaintiffs, suing for themselves and other similarly situated, seek to have declared unconstitutional all state laws which prevent their use on the same basis as white persons of the golf course and other facilities of City Park, the suit presents no disputed factual issues and no new principles. Attempting to assert that there was a substantial issue of fact which should have prevented the trial court from acting on motion for summary judgment, appellant takes the completely untenable position that we should ignore the decision of the Supreme Court in the two cited cases because, so it states, they were posited on the ratio decidendi of that court in the school segregation cases of Brown et al v. Board of Education of Topeka, 347 U. S. 483, which, appellant contends, were based on psychological considerations not here applicable. Appellant seeks to present this as a fact issue, contending that the trial court should have heard evidence to determine whether such psychological considerations are present in the denial of access on a non-segregated basis to the City Park. Whatever may have been the basis of the Supreme Court's decision in the Atlanta and Baltimore cases, they were nevertheless decided on identical issues that are presented here, and they are, of course, binding on us. The courts

have decided that the refusal of city and state officials to make publicly supported facilities available on a non-segregated basis to Negro citizens deprives them of equal protection under the laws in too many cases for us to take seriously a contention that such decisions are erroneous and should be reversed.

The appeal is without merit and the judgment is
AFFIRMED.

APPENDIX "B".

CONSTITUTION, STATE OF LOUISIANA, 1921
ARTICLE XIX.

§ 26. Special Agencies of State; Withdrawal of Consent to Suits.

Section 26. The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:

(1) The State Parks Commission of Louisiana,

(2) The Recreation and Park Commission for the whole Parish of East Baton Rouge,

(3) All recreation districts created under terms of Article XIV, Section 14 (d-4) of this Constitution,

(4) Any municipal corporation, parish of subdivision of the State in matters respecting the operation or maintenance of parks and other recreational facilities or in connection with any rule or regulation applicable thereto,

(5) The State Board of Education,

(6) The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College,

(7) The parish school boards of each of the parishes of the State of Louisiana,

(8) The school boards of the municipalities of Monroe in Ouachita Parish and Lake Charles in Calcasieu Parish, and Bogalusa in Washington Parish,

(9) The State Superintendent of Public Education in his capacity as such as well as in the capacity of ex-officio secretary of the State Board of Education, and

(10) The State Department of Education.

The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, (however heretofore given) is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in this section. This withdrawal of consent to suits and legal proceedings shall apply not only to suits and legal proceedings filed in the future but also to any pending suits or legal procedure. There is expressly excepted from the foregoing, suits for the enforcement of contracts entered into by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35 of Article III of this Constitution.

This section shall be self-operative and shall supersede any other portion of this Constitution or any statutes or regulations in conflict herewith. (Added Acts 1956, No. 613, adopted Nov. 6, 1956).

APPENDIX "C".

LOUISIANA REVISED STATUTES

33:4558.1. Separation of White and Colored Races.

A. All public parks, recreation centers, playgrounds, community centers and other such facilities at which swimming, dancing, golfing, skating or other recreational activities are conducted shall be operated separately for members of the white and colored races. This shall not preclude mixed audiences at such facilities, provided separated sections and rest room facilities are reserved for members of white and colored races. This provision is made in the exercise of the state's police power and for the purpose of protecting the public health, morals and the peace and good order in the state and not because of race.

B. "Public" parks and other recreational facilities as used herein shall mean any and all recreational facilities operated by the State of Louisiana or any of its parishes, municipalities or other subdivisions of the state.

C. Any person, firm or corporation violating any of the provisions of this Section shall be deemed guilty of a misdemeanor and upon conviction therefor by a court of competent jurisdiction for each such violation shall be fined not less than five hundred dollars nor more than one thousand dollars, or sentenced to imprisonment in the parish jail not less than ninety days nor more than six months, or both, fined and imprisoned as above, at the discretion of the court. Acts 1956, No. 14, §§ 1-3.

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OCTOBER TERM, 1958

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PETITION FOR REHEARING ON BEHALF OF APPELLANT.

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PETITION FOR REHEARING ON BEHALF OF APPELLANT.

GROUNDS FOR REHEARING.

The Court should have entertained an appeal in this matter and granted the relief sought by Appellants in the Jurisdictional Statement filed herein in order that the issues raised in the Jurisdictional Statement might

be considered after briefing and oral argument before this Court and, particularly, question (c) of the Jurisdictional Statement, appearing at page 4 thereof, reading as follows:

> "In not permitting Appellants the opportunity to introduce evidence to determine whether psychological consideration of the case of Brown et al. v. Board of Education of Topeka, 347 U. S. 483, are factually valid and/or applicable to public parks."

The denial of an opportunity for briefing and oral argument amounts to an amendment of the Constitution by this Honorable Court's adhering to the doctrine of *Brown, et al., v. Board of Education of Topeka*, 347 U. S. 483 and not permitting anyone to question the non-judicial "modern authorities" quoted therein in Footnote 11 (quoted in their entirety at page 11 of the Jurisdictional Statement filed herein, commencing at page 11).

See Appendix "A" hereto from a very recent issue of *U. S. News & World Report*, copyrighted and published weekly by the U. S. News Publishing Corporation, 23 N Street, N. W., Washington 7, D. C., Vol. XLV, No. 17, dated October 24, 1958, commencing at page 110, by Dean Alfred J. Schweppe, Member, Board of Editors, American Bar Association "Journal," Former Dean of the University of Washington Law School and former president of the Bar Association of the State of Washington, entitled "Court Rewrites Constitution in Its Own Image."

CONCLUSION.

It is submitted that this Court should reconsider its ruling affirming the judgment of the two lower Courts and entertain Appellants Jurisdictional Statement and place this suit upon the Appellate Docket of this Court, and after a briefing and rehearing thereon reverse the judgments of the lower Courts and remand the matter for further proceedings in the case, in the District Court.

Respectfully submitted,

LOUIS B. PORTERIE,
1206 American Bank Building,
New Orleans, La.;
ED J. de VERGES,
Whitney Building,
New Orleans, La.,
Attorneys for New Orleans City Park Improvement Association and Ellis P. Laborde, The Manager Thereof, Appellant.

AFFIDAVIT OF SERVICE PURSUANT TO RULE 33 OF THE RULES OF SUPREME COURT OF THE UNITED STATES.

STATE OF LOUISIANA :
PARISH OF ORLEANS :

Before me, the undersigned authority, personally came and appeared Louis B. Porterie, Attorney for the New Orleans City Park Improvement Association and Ellis P. Laborde, the Manager thereof, Appellants, who did depose and state that he has served a copy of the foregoing Petition for Rehearing to the Supreme Court of the United States by depositing the same in the United States Post Office or mail box with first-class postage prepaid, addressed to:

1. The Appellees through their Attorney of Record, A. P. Tureaud, 1821 Orleans Avenue, New Orleans, Louisiana, this _____ day of August, 1958.

_____

LOUIS B. PORTERIE,
1206 American Bank Bldg.,
New Orleans, Louisiana.

SWORN TO AND SUBSCRIBED
before me this _____ day of
_____, 1958,
New Orleans, La.

_____

Notary Public

APPENDIX "A"

"COURT REWRITES CONSTITUTION IN ITS OWN IMAGE"

by Alfred J. Schweppe

Member, Board of Editors, American Bar Association "Journal"

Former Dean of the University of Washington Law School

And Former President of the Bar Association of the State of Washington

I absolutely reject the idea that the Supreme Court has the power to rewrite the Constitution according to its concepts of sociological or economic change. That is what the amendatory process is for. I do not accept Justice Douglas's blunt view that the amendatory process is "too slow" as anything but a violation of the oath to support the Constitution in all of its parts.

In an address before the New York City bar in 1949, attempting to defend the Court's wholesale overruling of prior decisions, he calmly said: "It must be remembered that the process of constitutional amendment is a long and slow one."

The obvious answer is, of course, that the people have amended the Constitution fast or slowly, or not at all, as in their judgment the circumstances required. Since when has the judicial power of the Supreme Court been extended to passing on the competence of the people to frame their own government in their own good time?

With all due respect, such an attitude must be regarded as a self-arrogation of superior paternal wisdom which would have left the Founding Fathers stunned.

My view was shared by Washington, Jefferson, Jackson and others, some of whom are held up as great beacon lights of liberalism. I think legal recognition of sociological and economic changes should come by way of constitutional amendment, or congressional action, whichever is appropriate.

In my opinion, once the Court has construed a constitutional provision, that construction should stand until changed by amendment, unless later evidence is found of *the intent of the framers* of the provision which shows the first construction to have been erroneous. That, of course, is why Madison's "Notes," Elliott's "Debates," and the "Federalist" are so valuable.

Any other approach seems to me to lead to the inevitable conclusion that the Constitution is the plaything of the judges at any time in office, which is, of course, the Warren-Black-Douglas concept, initiated by Holmes in Missouri v. Holland, where he said that the case "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."

In so stating, Holmes rejected the Jefferson-Taney view of the treaty power, accepted and blessed by strong judicial statements for over a hundred years. Following Holmes, the idea of a "rubber Constitution," with the Court acting not as judges but as policy makers, though

piously disavowing the role, has become accepted almost as normal constitutional doctrine.

My objection is to the reckless manner in which the present Court flouts the precedents laid down by the great Courts ahead of it and, glibly bypassing the constitutional-amendment process of Article V, rewrites the Constitution in its own image.

From a lawyer's standpoint the segregation decisions, which are deemed by many to be tender legal ground that should be avoided, will serve my purpose as well as any. I am dealing now, not with a sensitive sociological problem, but solely with the adjudication processes of the present Court in those cases, which leave one almost breathless with amazement.

When the Court, in the first Brown v. Board of Education school-segregation case, in 1954, found the history of the Fourteenth Amendment to be "inconclusive" —which was, I believe, an understatement—one would think that a Court, *acting judicially*, would have said that, "there being no persuasive evidence of intent of the framers of the Amendment that the prior decisions of the Court are wrong, those decisions must stand, with the subject matter left to Congress or the amendatory process, as the Court has so often heretofore said about policy matters."

Just a few words about the prior decisions to illustrate my point. There were a number of applicable earlier precedents, the first in 1896, the last in 1950.

By way of concrete example, in the Gong Lum case of 1927—a school case from the State of Mississippi, in which both the question of equal protection of the laws per se and the separate-but-equal question under the Fourteenth Amendment were directly raised—the Supreme Court, then composed of Chief Justice Taft and Justices Holmes, Brandeis, Stone, Van Devanter, McReynolds, Sutherland, Butler and Sanford, *unanimously* decided both questions in favor of the segregated schools provided for by the constitution of the State of Mississippi (see detailed comments, Congressional "Record," July 21, 1958, p. 13106, especially 13107).

Indeed, Chief Justice Taft, writing the opinion of the *unanimous* Court, said: "Were this a new question it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the State legislature to settle without intervention of the federal courts under the Federal Constitution."

Thus in 1954 the present Supreme Court reversed precedents upholding segregated-school legislation not written alone in 1896, although the Court in Plessy v. Ferguson was much closer in time to the intent of the Fourteenth Amendment than it was 60 years later, but a decision rendered unanimously in 1927 by a great Court headed by Chief Justice Taft, and including among its membership Justices Holmes, Brandeis and Stone, whose names are commonly associated with a liberal view of the Constitution in the field of individual rights.

It will be especially noted that the distinguished 1927 Court considered itself bound by the long-established precedents, and that it was not within judicial competence to upset a constitutional interpretation so long settled.

There is no question that the decisions in the Brown and Bolling cases in May of 1954, giving a completely new meaning to the Constitution, were a violent shock to those who believe in constitutional stability and constitutional precedent, and who look upon the judges of the Supreme Court as declarers of law rather than as social engineers, since changes in the social order, insofar as they fall within the federal domain, seem clearly to have been left to Congress or the amendment process by those who wrote the Constitution and its various added provisions.

Chief Justice John Marshall said in the great case of Marbury v. Madison: "It is emphatically the province and duty of the judicial department to say what the law is."

There is no doubt what the law was at 11:59 a.m. on May 17, 1954. It had been definitely settled in Gong Lum in 1927, and in other cases. In 1938, Chief Justice Hughes, speaking for a majority of himself and Justices Brandeis, Stone, Black, Reed and Roberts, had said in Missouri *ex rel* Gaines v. Canada:

> "The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, *a method the validity of which has been sustained by our decisions.* Plessy v. Ferguson, (163 U. S. 537,

544); McCabe v. Atchison, Topeka and Santa Fe Railway Co. (235 U. S. 151, 160); Gong Lum v. Rice (275 U. S. 78, 85, 86). Compare Cumming v. Board of Education (175 U. S. 528, 544, 545)."

In fact, in Sweatt v. Painter, the identical Court that decided the Brown case in 1954—substituting only Chief Justice Vinson for Chief Justice Warren—namely, Justices Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton, rested the decision squarely on the separate-but-equal doctrine.

But on May 17, 1954, at 1 p. m., all this was changed—changed by a judicial amendment of the Constitution—by a Court that, instead of declaring "what the law is," declared what, in the personal opinion of the then-incumbent judges, the law ought to be, in spite of a hundred years of federal and State legislation to the contrary, and contrary to judicial decisions long accepted by the Court itself as conclusive.

Moreover, in so doing, the Court did not even take notice of the long-established criteria for determining whether there has been a violation of the equal-protection clause of the Fourteenth Amendment, namely, that legislative classifications are valid unless without any rational basis whatsoever, so that reasonable men cannot differ (see American Bar Association "Journal," April, 1956, pp. 313, 316-17).

How far the Court went overboard in 1954 is most luridly demonstrated in the companion case—Bolling v. Sharpe, a case amazingly overlooked most of the time by

Court critics—in which the Court flagrantly amended the due-process clause of the Fifth Amendment by converting it into an equal-protection clause.

School Case "Was Startling"

If the Brown v. Board of Education case was startling, the companion Bolling case, invalidating the segregated-school statutes of Congress in the District of Columbia almost 100 years old, was even more startling.

The Court decided the Brown case under the equal-protection clause of the Fourteenth Amendment, saying:

> "We hold that the plaintiffs and others similarly situated, for whom the actions have been brought, are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion, whether such segregation also violates the due-process clause of the Fourteenth Amendment."

But in the companion case of Bolling v. Sharpe, decided the same day with reference to the District of Columbia's segregated-school statutes enacted by Congress, the Court faced the dilemma that the Federal Constitution contains no equal-protection clause as a limitation on the Federal Government. The Fourteenth Amendment contains both a due-process and an equal-protection clause, the due-process clause having been taken over verbatim from the Fifth Amendment, and adds purposefully an equal-protection clause, because that concept was deemed and construed not to be embraced in due process (see

Hurtado v. California). But the Fifth Amendment, applicable to the Federal Government, contains only a due-process clause.

However, the Court that had made the psychological ruling in the Brown Case was equal to the dilemma that it faced in the Bolling Case. It held that the due-process clause of the Fifth Amendment should be deemed also an equal-protection clause as respects the Federal Government—a clear case of judicial amendment of the Constitution.

When the Fifth Amendment was adopted in 1791, at the instance of the very first Congress, importation of slaves was expressly protected in the Federal Constitution until 1808—Art. 1, Sec. 9—and slaves were then considered property protected by the due-process clause of the Fifth Amendment.

Thus a provision of the Federal Constitution which when adopted in 1791 did not prohibit but protected slavery, is now construed in 1954 to prohibit segregation in the public schools of the District of Columbia. The present Court no longer concerns itself with the intent of the Founding Fathers or the framers of the Fourteenth Amendment, but substitutes its own (see Ralph T. Catterall, "Judicial Self-Restraint," American Bar Association "Journal," September, 1956, page 829).

While I can agree with Bancroft that a Court decision that violates the Constitution is just as void as an act of Congress that violates the Constitution, who will settle the question? The Bolling case, for example, in my opinion *flagrantly* and by illogical and ludicrous reason-

ing violates the Constitution and indelibly highlights how far the Court was making policy in the Brown case and changing the Fifth Amendment to conform to the Fourteenth in the Bolling case (see comments printed in the Congressional "Record," July 21, 1958, pp. 13106, especially 13108, second column).

Obviously the Court, having made up its collective mind to outlaw State statutes and constitutional provisions, did not face up to the completely different constitutional situation in the District; so the judges closed their eyes to the text and history of the due-process clause of the Fifth Amendment—and as interpreted in the Fourteenth—and completely rewrote it, I think, inexcusably. But will Congress or the Executive defy this unconstitutional decision? Apparently not. The Jacksonian attitude toward unpalatable Supreme Court decisions no longer prevails: "John Marshall wrote it; let him enforce it."

Extending "Judicial Power"

The purely legislative pronouncements of the new Chief Justice, then scarcely one year and nine months in office, in the second Brown case in 1955 bring shudders to any student of constitutional law who knows that the judicial power of the United States extends only to individual cases and controversies. He said:

> "All provisions of federal, State, or local law requiring or permitting such discrimination must yield to this principle."

By the time the next school case from some individual State or city comes to the Court involving some

segregation statute, the whole present Court could conceivably have disappeared in an epidemic or other major catastrophe, and a new Court wipe out the judicial extravaganzas entitled Brown and Bolling, by returning to Plessy, Gong Lum, Gaines and other cases.

Such a new Court would require no precedents for so doing other than the Brown and Bolling cases and an earnest desire to restore the Court to its proper place in the constitutional scheme.

Of course, I am sure that there would be much shouting in certain circles that the new Court had violated the sacred rules of judicial precedent. Why the more experienced judges on the Court signed their names to such a judicially indefensible statement as that just quoted above one can only conjecture. Under the Constitution, the ruling could apply only to the cases then before the Court, and no others whatsoever.

There is no doubt that Congress has a major responsibility for what the Court has done in many areas. Prodded by some Chief Executives, Congress has passed laws that have put great strains on the Court, which, in turn, has put great strains on the Constitution. For those results Congress and Executives who announce that no doubts as to constitutionality should deter Congress from passing Executive-requested bills are at least in part responsible.

However, in those judicial areas where the Court is under no such legislative and executive pressures, the Court is alone responsible; and it ought to proceed always

with the classic judicial restraint which some of its greatest members have so often expressed.

It is in those areas where the Court, without needing to do so, has upset long-established lines of decisions, struck down State statutes or unnecessarily interpreted federal statutes to exclude State action such as in the subversion and labor-relations fields, or has taken over the administration of State criminal laws by novel Fourteenth Amendment pronouncements, that the criticism has been strongest and ever mounting and, in my judgment, rightly so.

It cannot, it seems to me, be successfully gainsaid that the present Court, though officially denying it, has taken on the role of federal policy making properly belonging elsewhere. Furthermore, there seems little doubt that, to the present Court, Article V of the Constitution governing its amendment is essentially a dead letter.

The fact is that Jefferson's fears of what the Supreme Court would do to the Constitution have been realized. The concept of limited and delegated powers is practically gone. That concept went out of the window with Helvering v. Davis, in which the majority, rejecting Madison's and accepting Hamilton's alleged view, held that Congress had unlimited spending power for "the general welfare," with Congress being the judge of the "general welfare." This unlimited spending power is, of course, bound to obscure the line between State and federal functions in many fields and to reduce the States to mere pawns.

With its power of condemnation and unlimited spending, the Federal Government can bring on socialism overnight, if it chooses. I personally favor a constitutional amendment to embody Madison's view of the spending power, but I don't expect one ever to be adopted. The writers of the "Federalist" said that agriculture was, as a classic illustration, a subject solely within the purview of the States; but now we sustain federal legislation, punishing farmers for raising wheat for their own use only, without a federal quota, under the guise of regulating commerce. How intellectually off base can people get?

Of course, Attorney General Rogers's political-legal views on segregation, if correctly publicized, will not bear analysis. Anybody has the right to resist Supreme Court decisions by all lawful means. Congress has corrected the Court many times. When the Court held the first Agriculture Adjustment Act unconstitutional, for example, Congress promptly passed a new one and dared the Court. It caved. There are numerous other illustrations.

The State schools are created and maintained by the States at their pleasure. They can abolish them tomorrow and the Supreme Court cannot do anything about it within any rational constitutional concept. Closing them completely as public schools certainly violates no concept of equal protection because they are closed as to all. The States have a right to pass any laws or do any acts that will legally bypass the Court's decisions, difficult as that may be with a Court that is now "on the spot" to defend its novel policies on a case-by-case basis.

However, possibly this political Court *which has, in my view, lost all proper sense of place in the consti-*

tutional scheme, may grant a mandamus or mandatory injunction to open the schools on the theory that free public education at State expense is now one of the freedoms protected by the Fourteenth Amendment!

I personally have never had any opposition to integration, which I have lived with happily on a small scale all my life; but I have never believed in a legal compulsion of the South—especially by the Court. The South lives in a situation which, until the Warren Court, was deliberately held to be solely within the purview of the States and not of the federal courts except as to equal treatment, and at the federal level primarily in Congress. I have never believed that the Southern situation should be settled by those who don't have it, but only by those who live with it. Apparently history has taught some of us nothing.

CERTIFICATE OF COUNSEL.

I, ED. J. deVERGES, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

COUNSEL FOR PETITIONER